



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 1, 2004

Ms. April M. Virnig  
Taylor Olson Adkins Sralla Elam  
6000 Western Place, Suite 200  
Fort Worth, Texas 76107-4654

OR2004-1545

Dear Ms. Virnig:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 196903.

The City of Haltom City (the "city"), which you represent, received a request for certain e-mail communications sent to or from the official city e-mail address of a former city manager.<sup>1</sup> You assert that some of the materials that you have submitted are not subject to the Public Information Act (the "Act"), chapter 552 of the Government Code. You also seek to withhold some of the submitted information that is subject to the Act under sections 552.101, 552.107, 552.109, and 552.137 of the Government Code. We have considered your arguments and have reviewed the submitted information.<sup>2</sup>

Initially, we address your argument that some of the submitted materials are not subject to the Act. In Open Records Decision No. 581 (1990), this office determined that certain computer-related information that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property, such as source codes, documentation information, and other computer programming, is not the kind of information

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<sup>1</sup>You inform us that the original request, as received by the city on November 13, 2003, was subsequently clarified and modified by the requestor. See Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); Open Records Decision No. 663 at 2-5 (1999) (addressing circumstances under which governmental body's communications with requestor to clarify or narrow request will toll ten-business-day deadline to request decision under Gov't Code § 552.301(b)).

<sup>2</sup>This letter ruling assumes that the submitted representative samples of information are truly representative of the responsive information as a whole. This ruling neither reaches nor authorizes the city to withhold any information that is substantially different from the submitted information. See Gov't Code § 552.301(e)(1)(D); Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

that is made public under section 552.021 of the Act. *Id.* at 6. You inform us that some of the submitted materials consist of computer source codes and other devices that are used to maintain and protect the city's computers. You assert that these materials are not public information for the purposes of the Act. Based on your representations and our review of the materials in question, we conclude that the documents that we have marked do not constitute public information for the purposes of section 552.002 of the Act. Therefore, those materials are not subject to disclosure under section 552.021 of the Act and need not be released.

You also contend that the Act is not applicable to some of the submitted e-mails. Section 552.002 of the Act defines "public information" as consisting of

information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body; or
- (2) for a governmental body and the governmental body owns the information or has a right of access to it.

*Id.* § 552.002(a). You inform us that some of the submitted e-mails consist of a former city manager's personal communications. You assert that these e-mails were not collected, assembled, or maintained under any law or ordinance or in connection with the transaction of any official business. Based on your representations and our review of the communications in question, we conclude that these communications do not fall within the definition of public information under section 552.002. *Cf.* Open Records Decision No. 635 at 8 (1995) (personal calendar purchased and maintained by governmental employee who had sole access to it not subject to Act). Therefore, the Act does not require the city to release these communications to the requestor.

Next, we address your claims with regard to the submitted information that is subject to the Act. You contend that some of the information is private under sections 552.101 and 552.109 of the Government Code. Section 552.101 excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses constitutional and common-law rights to privacy. Constitutional privacy protects two kinds of interests. *See* Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987); *see also Whalen v. Roe*, 429 U.S. 589, 599-600 (1977). The first is the interest in independence in making certain important decisions related to the "zones of privacy," pertaining to marriage, procreation, contraception, family relationships, and child rearing and education, that have been recognized by the United States Supreme Court. *See* Open Records Decision No. 455 at 3-7 (1987); *see also Fado v. Coon*, 633 F.2d 1172 (5<sup>th</sup> Cir. 1981). The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. *See* Open Records Decision No. 455 at 6-7 (1987); *see also Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5<sup>th</sup> Cir. 1985), *reh'g denied*, 770 F.2d 1081 (1985), *cert. denied*, 474 U.S. 1062 (1986). This aspect of constitutional privacy balances the individual's privacy

interest against the public's interest in the information. *See* Open Records Decision No. 455 at 7 (1987). Constitutional privacy is reserved for "the most intimate aspects of human affairs." *Id.* at 8 (quoting *Ramie v. City of Hedwig Village*, 765 F.2d at 492).

Common-law privacy under section 552.101 protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) of no legitimate public interest. *See Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy encompasses the specific types of information that the Texas Supreme Court held to be intimate or embarrassing in *Industrial Foundation*. *See* 540 S.W.2d at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has since concluded that other types of information also are private under section 552.101. *See* Open Records Decision Nos. 659 at 4-5 (1999) (summarizing information attorney general has determined to be private), 470 at 4 (1987) (illness from severe emotional job-related stress), 455 at 9 (1987) (prescription drugs, illnesses, operations, and physical handicaps), 343 at 1-2 (1982) (references in emergency medical records to drug overdose, acute alcohol intoxication, obstetrical/gynecological illness, convulsions/seizures, or emotional/mental distress).

Section 552.109 excepts from required public disclosure "[p]rivate correspondence or communications of an elected office holder relating to matters the disclosure of which would constitute an invasion of privacy[.]" This office has ruled that the test to be applied to information that is claimed to be protected by section 552.109 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected by common-law privacy. *See* Open Records Decision No. 506 at 3 (1988). Accordingly, we will address your claims under sections 552.101 and 552.109 together.

In this instance, the information that you claim is private is contained in communications involving a former city manager. You inform us that this information includes communications with members of the city council. As this office has often noted, the public has a legitimate interest in information that relates to the workplace conduct and performance of public officials and employees. *See* Open Records Decision No. 423 (1984). We have reviewed the information that you claim is private and conclude that the city may not withhold any of the information at issue under sections 552.101 or 552.109. *See also* Open Records Decision Nos. 405 at 2 (1983) (manner in which public employee performed his or her job cannot be said to be of minimal public interest), 444 at 4 (1986) (public employee's personnel file information will generally be available to public regardless of whether it is highly intimate or embarrassing), 470 at 4 (1987) (public employee's job performance does not generally constitute private affairs), 473 at 3 (1987) (fact that public employee receives less than perfect or even very bad evaluation not protected by common-law privacy), 542 at 5 (1990) (information regarding public employee's qualifications is of legitimate concern to public).

You also seek to withhold some of the submitted information under section 552.107(1). This section protects information that comes within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. *See* TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *See In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You inform us that some of the submitted e-mails consist of communications with attorneys for the city and involve requests for legal advice or opinions. Based on your representations and our review of the information that you seek to withhold under section 552.107(1), we conclude that most of the information at issue comes within the scope of the attorney-client privilege. The city may withhold that information, which we have marked, under section 552.107(1).

We next note that section 552.117 may be applicable to a small amount of the submitted information. Section 552.117(a)(1) excepts from public disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who timely requests that this information be kept confidential under section 552.024. Whether a particular item of

information is protected by section 552.117(a)(1) must be determined at the time that the request for the information is received by the governmental body. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the city may only withhold information under section 552.117(a)(1) on behalf of a current or former official or employee who requested confidentiality under section 552.024 prior to the date of the city's receipt of the request for the information in question. The city may not withhold information under section 552.117(a)(1) on behalf of a current or former official or employee who did not make a timely request for confidentiality under section 552.024. We have marked the information that the city may be required to withhold under section 552.117(a)(1).

Lastly, we address your claim under section 552.137. As amended by the 78<sup>th</sup> Legislature, this section provides as follows:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Act of June 2, 2003, 78<sup>th</sup> Leg., R.S., ch. 1089, § 1, 2003 Tex. Sess. Law Serv. 3124 (to be codified as amendment to Gov't Code § 552.137). Section 552.137 excepts from public disclosure certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with a governmental body, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. Section 552.137 is not applicable to the types of e-mail addresses listed in section 552.137(c). Likewise, section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. We have marked the types of e-mail addresses that are confidential under section 552.137(a). You inform us that there is no indication that the individuals to whom these e-mail addresses belong have affirmatively consented to their public disclosure. Based on your representation, we conclude that the city must withhold the marked e-mail addresses under section 552.137.

In summary: (1) the marked computer materials that do not constitute public information under the Act are not subject to disclosure; (2) the personal e-mail communications that do not constitute public information need not be released; (3) the city may withhold the marked attorney-client communications that are excepted from disclosure under section 552.107(1); (4) the city may be required to withhold a small amount of other marked information under section 552.117(a)(1); and (5) the city must withhold the marked e-mail addresses under section 552.137. The rest of the submitted information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor

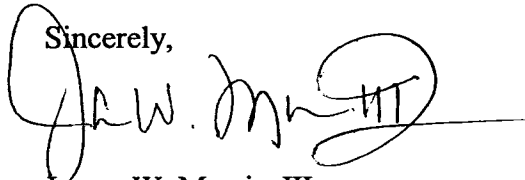
should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J.W. Morris III", with a long horizontal line extending to the right.

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/sdk

Ref: ID# 196903

Enc: Submitted documents

c: Mr. Stephen English  
c/o April M. Virnig  
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(w/o enclosures)